FILE COPY

Supreme Court
FILED
APR 30 19
CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 757

GREAT NORTHERN RAILWAY COMPANY AND MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILROAD COMPANY, *Petitioners,*

vs.

PAUL F. LEHMAN ET AL., AND DISTRICT COURT OF THE SIXTEENTH JUDICIAL DISTRICT OF MINNESOTA AND HONORABLE E. R. SELNES, AS JUDGE OF SAID DISTRICT COURT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA AND BRIEF IN SUPPORT THEREOF.

MOTION AS TO EXHIBITS

EDWIN C. MATTHIAS,
ANTHONY KANE,
ROBERT W. CROMON,
Counsel for Petitioner,
Great Northern Railway Company;
JAMES L. HETLAND,
ROSS L. THORKELSON,
Counsel for Petitioner,
Minneapolis, St. Paul & Sault
Ste. Marie Railroad Company.

A. REA WILLIAMS,
Of Counsel.

INDEX

Subject Index

	Page
Petition for writ of certiorari	1
Summary statement of the matter involved	1
Jurisdictional statement	9
Questions presented	12
Reasons relied on for allowance of writ	13
Prayer for writ	15
Motion as to exhibits	17
Brief in support of petition	19
Opinion of the court below	19
Jurisdiction	19
Statement of the case	19
Specifications of error	19
Argument	20
A. With respect to lack of due process	20
B. With respect to denial of equal protection of law	28
Appendix A—Minnesota Statutes, 1945	33
Appendix B	38

Table of Cases Cited

American Surety Co. v. *Baldwin*, 287 U. S. 156	10
Angel v. *Bullington*, 330 U. S. 183	12
Bailey v. *Alabama*, 219 U. S. 219	25
Brinkerhoff-Faris Trust & Savings Co. v. *Hill*, 281 U. S. 673	10
C. M. St. P. & P. Ry. Co. v. *Sprague*, 140 Minn. 1, 167 N. W. 124	22
Chicago, M., St. P. & P. R. R. Co. v. *Minnesota*, 134 U. S. 418	28
Galpin v. *Page*, 85 U. S. 350 (18 Wall.)	13, 25
Great Northern Ry. Co. v. *Sunburst Oil & Refining Co.*, 287 U. S. 358	10
Harvey v. *Tyler*, 69 U. S. 328 (2 Wall.)	13, 25
Kansas City So. Ry. Co. v. *Road Improvement District No. 6*, 256 U. S. 658	11, 14, 29

Page

Kennedy v. *Bank of Georgia*, 49 U. S. 586 (8 How.) . . 22
Lamp Chimney Co. v. *Brass & Copper Co.*, 91 U. S. 656 22
Manley v. *Georgia*, 279 U. S. 1 25
McFarland v. *American Sugar Co.*, 241 U. S. 79 25
Merchants & F. Mut. Cas. Co. v. *St. Paul Mercury Ind. Co.*, 218 Minn. 386, 16 N. W. 2d 463 23
Missouri ex rel. Missouri Insurance Company v. *Gehner*, 281 U. S. 313 10
Nickey v. *Mississippi*, 292 U. S. 393 30
Oregon R. R. & N. Co. v. *Fairchild*, 224 U. S. 510 . . 14,26, 27
Pennoyer v. *Neff*, 95 U. S. 714 . . . . . 20, 25
Pittsburgh, C. & St. L. R. Co. v. *Ramsey*, 89 U. S. 322 (22 Wall.) 22
Powell v. *Alabama*, 287 U. S. 45 . . . . . 21, 25
Rose v. *Himely*, 8 U. S. 240 (4 Cranch 241) 20
Scott v. *McNeal*, 154 U. S. 34 . . . . . 21, 25
Skolnick v. *Gruesner*, 196 Minn. 318, 265 N. W. 44 22
Southern Railway v. *King*, 217 U. S. 524 27
State ex rel. Town of Dovray v. *Nelson*, 145 Minn. 31, 176 N. W. 181 21
Sully v. *American National Bank*, 178 U. S. 289 30
Thomas v. *Kansas City So. Ry. Co.*, 261 U. S. 481 . 11, 14, 31
Thompson v. *Whitman*, 85 U. S. 457 20
United States v. *Commissioner of Immigration*, 273 U. S. 103 27
United States v. *Griffin*, 303 U. S. 226 22
Western & Atlantic Railroad v. *Henderson*, 279 U. S. 639 . . . . . 13, 25

STATUTES CITED

Laws of Minnesota, 1947, Chapter 143, Section 63, Subdivision 5 8
Minnesota Constitution, Article VI 1
Minnesota Statutes, 1945, Chapter 106 (the Drainage Code) 23
Minnesota Statutes, 1945, section 547.04 3
United States Code, Title 28, § 1257(3) and 2101 (c) . . 19
United States Constitution, Fourteenth Amendment, section 1 . . . . . 9, 10, 12,13, 14, 15, 20, 27

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 757

GREAT NORTHERN RAILWAY COMPANY AND MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILROAD COMPANY,

Petitioners,

vs.

PAUL F. LEHMAN ET AL., AND DISTRICT COURT OF THE SIXTEENTH JUDICIAL DISTRICT OF MINNESOTA AND HONORABLE E. R. SELNES, AS JUDGE OF SAID DISTRICT COURT.

Respondents

PETITION FOR WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

The petition of Great Northern Railway Company and Minneapolis, St. Paul & Sault Ste. Marie Railroad Company respectfully shows to this Court:

Summary Statement of the Matter Involved

This is a petition for a writ of certiorari directed to the Supreme Court of the State of Minnesota (the highest court of Minnesota, Article VI of Minnesota Constitution) for review of its decision [1] dated January 28, 1949 (R. 761-771),

[1] 36 N.W. (2d) 336.

its order denying petition for rehearing dated March 4, 1949 (R. 800), and its final judgment entered March 4, 1949 (R. 801, 802). The State Supreme Court affirmed the District Court's (trial court) order (R. 83-91) establishing a drainage ditch (designated Judicial Ditch No. 12) under Chapter 106, Minnesota Statutes, 1945 (the Drainage Code). The ditch would be located on lands in the vicinity of the tracks of your petitioners (Exhibit 1). The Great Northern Railway Company has been assessed $150,000.00 and the Minneapolis, St. Paul & Sault Ste. Marie Railroad Company $50,000.00 as alleged benefits (Exhibit H).

These proceedings began with an ex parte hearing January 8, 1946 (R. 13), when certain of the respondents filed an unverified petition with the state trial court for the establishment of a drainage ditch. The petition called for main ditch and three laterals in Grant, Wilkin and Traverse counties, Minnesota. The trial court on:

January 8, 1946, ex parte and without notice to your petitioners found the petition was signed by the required number of persons; assumed jurisdiction of the subject matter and appointed an engineer (R. 17, 18).

August 16, 1946, held a preliminary hearing on the engineer's preliminary report and survey (R. 47).

August 19, 1946, ordered a final survey (R. 51).

October 19, 1946, appointed viewers (R. 53).

October 25, 1947, November 10, 1947, December 15, 1947, December 16, 1947, January 10, 1948, held a final hearing on the engineer's final report and the viewers' report of assessments for benefits and awards for damages and entered its final order establishing the ditch and approving the engineer's and viewers' reports (R. 83-91).

Your petitioners appeared at each session of the final hearing (R. 83) and contested the establishment of the drainage ditch and the assessments for benefits on the

grounds that the ditch was neither feasible nor practicable and they would receive no benefits from it. (R. 71-74).

Jurisdiction of the District Court to establish the ditch depended on proof that "a petition signed by not less than a majority of the resident owners of the land described in the petition or by the owners of not less than 51 per cent of the area of such land" (Section 106.03, Appendix A, hereto) was filed with the Court.

The unverified petition for establishment of the ditch alleged (R. 1):

> "The undersigned are a majority of the resident owners, or, own more than 51 per cent of the land and area over and through which the proposed ditch as hereinafter set forth will pass and are the owners of land which will be liable to be affected by or assessed for the expense of the construction of said proposed ditch, * * *"

This allegation is not supported by any evidence in the record.

The trial court at the ex parte hearing January 8, 1946, held before the court acquired jurisdiction *in personam* or *in rem,* found that the petition had been signed by the requisite number of qualified persons as required by statute (R. 17). The Drainage Code contained no authority for the trial court to make a finding at said ex parte hearing as to the sufficiency of signers on the petition.

Under Minnesota Practice (Section 547.04, Minnesota Statutes, 1945) the record on appeal from a trial court to the State Supreme Court consists of a "settled case". A settled case is the transcript of testimony and exhibits from the trial, stipulated to by the parties (R. 115, 116), and certified by the court reporter (R. 758) and trial judge (R. 117) that it contains all of the evidence offered or received on the trial of the cause.

The record of the trial court proceedings, properly certified to the State Supreme Court, and included in the record before this Court, is devoid of any evidence which would support the finding of the trial court made at the ex parte hearing as to sufficiency of signers on the petition. Your petitioners received no notice of this ex parte hearing. We were afforded no opportunity to be heard before the trial court's findings and order were made.

The State Supreme Court gave to the trial court's ex parte finding as to sufficiency of signers on the ditch petition the value of prima facie evidence and held that the ex parte finding placed on your petitioners the burden of rebutting this presumption (R. 771).

The viewers' report, Exhibit H, certified to this Court in the record herein, was prepared by the viewers pursuant to Section 106.17, Minnesota Statutes, 1945, Appendix A, hereto, which provides:

> "The viewers • • • shall • • • prepare in duplicate a tabular statement showing as far as practicable the description of each tract of land benefited or damaged; with the names of the owners as the same appear on the last county tax duplicate of the county • • •."

The owners of land described in the petition for the establishment of the ditch as the land over and through which the proposed main ditch and the three laterals would pass are listed in this exhibit. A comparison of the owners as listed in said exhibit and the signers on the petition demonstrates conclusively that the signers on the petition who were owners of the land therein described constituted far less than the required majority of said owners and further that said signers owned far less than the required 51 per cent of the area of such land.

Exhibit H conclusively showed that the petition did not comply with the statutory requirements as to signers so as

to give the trial court jurisdiction of the subject matter. At the conclusion of the final hearing the trial court again found that the ditch petition was signed by a sufficient number of resident owners of lands over which the proposed ditch would pass (R. 86). The only evidence in the case on this jurisdictional fact was wholly contrary to the finding of the trial court (Exhibit H, R. 299, 319).

The State Supreme Court cast aside the affirmative evidence in the viewers' report, Exhibit H, wholly ignored the burden of proof placed on the ditch petitioners by statute, and said (R. 771):

> "To check signatures on a petition to determine the true ownership of the parcels of land involved more is required than a mere inspection of the names found in the viewers' report and therein designated as owners. A calculation made from a mere inspection of such names does not necessarily result in a correct determination of percentages of true ownerships. An analysis made by relators-appellants of the signatures to the petition, using the tabulation of owners and descriptions of property as found in the viewers' final report, without proof that the named owners were in fact the real owners, is of little assistance. Respondents, admittedly going outside the record, contend that many persons listed as owners were not in fact owners. The presumption that goes with the final order has not been overcome, and this Court cannot hold that the District Court lacked jurisdiction."

Exhibit H, which was prepared in accordance with the provisions of Section 106.17, Minnesota Statutes, 1945, Appendix A, hereto, lists the owners of lands as they appear on the last county tax duplicate of each county. The viewers' report of owners is by Section 106.24, Subdivision 4, Minnesota Statutes, 1945, Appendix A, hereto, made a basis for the mailing of copies of the notice of final hearing so as to give the trial court jurisdiction *in personam*. The State

Supreme Court has refused to give evidentiary value as proof of ownership of land to the very report that is accepted and relied on in establishing the trial court's jurisdiction *in personam*.

The evidence also established that the assessments made by the viewers were based on an arbitrary formula under which farm lands were assessed at the following rates: $0.00, $2.00, $5.00, $10.00 and $14.00 per acre (R. 208) and the lands of your petitioner, Great Northern Railway Company, for the flat sum of $150,000.00 or more than $500.00 per acre (R. 460, 461, Exhibit H) and your petitioner, Minneapolis, St. Paul & Sault Ste. Marie Railroad Company, for the flat sum of $50,000.00 or $1,210.00 per acre (R. 439, Exhibit H).

Viewer Beeson testified that the assessment against petitioner, Great Northern Railway Company, of $150,000.00 was based upon alleged extra maintenance cost and alleged expense account slowing down of trains as a result of high water (R. 328). He admitted that his information with respect to train movements was based entirely on hearsay (R. 328). He further admitted that he had never discussed the alleged slowing down of trains or the matter of maintenance expense with any Great Northern Railway Company official (R. 329). He had never been employed on any railroad (R. 329). He had never seen high water alongside the track of the Great Northern Railway Company (R. 329). He admitted that there were drainage openings in the railroad right of way to take care of the water (R. 330) and that the grade of the railroad was 6 feet higher than the level of the adjoining lands (R. 330, 331). The positive testimony of Division Engineer Reichert for petitioner, Great Northern Railway Company, showed that no trains had ever been slowed down on this part of its railroad because of high water (R. 459, 465), and that no additional maintenance work had been performed on

the Great Northern tracks in this vicinity as a result of high water (R. 502). He also testified that the proposed ditch will be of no benefit to Great Northern Railway Company (R. 502).

Viewer Beeson testified that the assessment against petitioner, Minneapolis, St. Paul & Sault Ste. Marie Railroad Company, of $50,000.00 was based on alleged benefits to its bridge located at the south branch of the Rabbit River between sections 30 and 31, Champion Township (R. 368). Said bridge is not within the drainage area as established by the trial court (R. 436, Exhibit 1). Viewer Beeson further testified that in assessing benefits the viewers limited themselves to the drainage district as outlined by the ditch engineer (R. 370). Division Engineer Northenscold of the Minneapolis, St. Paul & Sault Ste. Marie Railroad Company testified that the proposed drainage project would not be of any substantial benefit to said company (R. 517). Roadmaster Krogstad and Division Engineer Northenscold both testified that Minneapolis, St. Paul & Sault Ste. Marie Railroad Company had never had any water damage to any portion of its track or right of way within the assessment area (R. 513, 546). No damages were awarded to petitioner, Minneapolis, St. Paul & Sault Ste. Marie Railroad Company, for lands necessarily to be taken for the construction of the main ditch across petitioner's right of way (Exhibit H). In addition thereto, petitioner, Minneapolis, St. Paul & Sault Ste. Marie Railroad Company, will be required to construct a $25,000.00 bridge at its own expense to permit the main ditch to pass across its right of way (R. 90).

On the other hand, the testimony of the ditch engineer was that the plans for the main ditch were prepared by the Highway Department of the State of Minnesota and not the ditch engineer (R. 150, 151) as required by law (Sections 106.10 and 106.12, Minnesota Statutes, 1945).

The ditch engineer collaborated and cooperated with the State Highway Department in locating the main ditch (R. 152). The main ditch was located alongside State Highway No. 9 for a distance of sixteen miles (R. 145, Exhibits A, B and C). The grade of said highway is low and has needed raising for many years, plans for which were made five or six years prior to the hearing (R. 175). The dirt excavated for the main ditch will be used to raise the grade of said state highway (R. 145, 146, 184). Your petitioners objected to the receipt in evidence of Exhibits A, B and C (the plans for the main ditch) for the reason that they were prepared by the State Highway Department, a keenly interested party (R. 150, 151, 153). The testimony further showed that substantially all of the lands in this watershed are agricultural lands (R. 142) and the ditch will prevent water from spreading out over these lands (R. 145).

At the conclusion of the final hearing the trial court found that the viewers' reports had been made in accordance with law, that the damages and benefits had been duly determined and that the reports of the viewers were complete, just and correct (R. 86, 87).

Your petitioners contested these findings of the trial court by statutory appeals (R. 113-115) and writs of certiorari (R. 94-113) which were consolidated by the State Supreme Court and heard on one record (R. 118, 119).[2] The State Supreme Court affirmed these findings of the trial court (R. 771).

Your petitioners contend that the State Supreme Court's decision deprives them of their property without due process of law in violation of Section 1 of the Fourteenth

---

[2] During the course of the proceedings in the trial court the Minnesota State Legislature in 1947 (Laws of Minnesota, 1947, Chapter 143, Section 63, Subdivision 5) provided for a statutory appeal from an order of a trial court establishing a judicial ditch where none existed before. The two methods were used to eliminate any question as to the proper method of review.

Amendment to the United States Constitution because it sustained the trial court's unsupported finding that there were sufficient signers on the petition for the drainage ditch to give it jurisdiction of the subject matter, which finding was wholly contrary to the record.

Your petitioners further contend that the State Supreme Court's decision deprives them of the equal protection of the law guaranteed by Section 1 of the Fourteenth Amendment to the United States Constitution because it approved the viewers' report and held that the viewers did not adopt an illegal, improper, arbitrary, unreasonable and capricious method of assessing benefits and awarding damages.

Jurisdictional Statement

1. *With respect to lack of due process.*

Your petitioners on appeal to the State Supreme Court assigned as error the finding of the trial court that (R. 86):

> "The original ditch petition filed herein is in all respects and particulars ample and sufficient in law and complies with the statutes applicable thereto, and that the same is signed by a sufficient number of resident owners of lands over which the proposed ditch will pass."

The State Supreme Court in its decision, disregarding conclusive evidence to the contrary, affirmed this finding and declared that (R. 770):

> "The statute makes the order establishing the ditch prima facie evidence of regularity of all proceedings prior to the making of such order. The final order in a ditch proceeding carries with it the usual presumption of regularity and propriety of official action, and is presumptive evidence of the validity of each step taken."

The statute referred to is Section 106.71, Minnesota Statutes, 1945, Appendix A, hereto. The application of these presumptions gave conclusive effect to this finding of jurisdictional fact, contrary to the record evidence.

In petition for rehearing (R. 772-798) your petitioners alleged that this reliance by the State Supreme Court on presumptions based on Section 106.71, and on the regularity and propriety of official action in a direct appeal would have the effect of creating conclusive presumptions, contrary to the record evidence, in violation of their rights under the due process clause of Section 1 of the Fourteenth Amendment to the United States Constitution (R. 786, 789, 797, 798). The presumptions indulged in by the appellate court were conclusive because your petitioners are not permitted in the appellate court to introduce evidence to meet them. Presuming the validity of the trial court's finding of this jurisdictional fact resulted in giving the trial court jurisdiction over the subject matter where such jurisdiction did not in fact exist.

Since these Federal questions did not arise until the State Supreme Court's decision of January 28, 1949, and the petition for rehearing thereon and denial thereof by said Court on March 4, 1949 (R. 800), these grounds for jurisdiction of the United States Supreme Court are new and unexpected bases for a claim by your petitioners of the violation of Federal rights. These Federal questions were duly raised by your petitioners. *Great Northern Railway Company* v. *Sunburst Oil & Refining Company,* 287 U. S. 358, 367; *Brinkerhoff-Faris Trust & Savings Company* v. *Hill,* 281 U. S. 673, 678; *Missouri ex rel Missouri Insurance Company* v. *Gehner,* 281 U. S. 313, 320; *American Surety Company* v. *Baldwin,* 287 U. S. 156.

2. *With respect to denial of equal protection of law.*

Under the Drainage Code (Section 106.17, Appendix A, hereto) the viewers appointed by the Court are charged with the duty of viewing the lands within the assessment area and preparing their report containing the assessments for benefits and awards for damages. During the proceedings in the trial court your petitioners objected to the admission in evidence of the viewers' report on the grounds that the viewers' assessment of benefits against railroad properties was excessive and inequitable in comparison to benefits assessed against agricultural acreage materially benefited by construction of the ditch and that said assessments were grossly inequitable, unjust, unfair, arbitrary, unreasonable and capricious (R. 71, 72, 296, 724, 725 and 726).

Your petitioners on appeal to the State Supreme Court assigned as error the finding of the trial court "that the viewers' original and amended reports have been made and filed and all other proceedings in the matter have been had in accordance with law; * * * that the damages and benefits have been duly determined * * * and * * * viewers' report as amended are complete, just and correct" (R. 759, 760).

Your petitioners contended in the State Supreme Court that the viewers' assessments were so unequal, arbitrary, capricious and unreasonable as to violate their rights under the equal protection of the law clause of the Fourteenth Amendment to the United States Constitution. Petitioners cited to the State Supreme Court the cases of *Kansas City So. Ry. Co.* v. *Road Improvement District No. 6*, 256 U. S. 658, and *Thomas* v. *Kansas City So. Ry. Co.*, 261 U. S. 481, as decisive of the Federal question raised. (See extracts from brief before State Supreme Court, Appendix B, hereto.)

The State Supreme Court affirmed the finding of the trial court and held (R. 764):

> "Appellants-relators contend that the viewers adopted an improper and illegal method of assessing benefits and awarding damages, and that their action was arbitrary, unreasonable and capricious. An analysis of the record does not bear out their claims * * *."

This determination was adverse to petitioners' contention that the viewers' actions violated petitioners' rights under the equal protection of the law clause of the Fourteenth Amendment to the United States Constitution.

The State Supreme Court made an affirmative finding that the formula adopted by the viewers for assessing benefits and awarding damages was not illegal and improper. In view of the United States Supreme Court's decision in *Angel* v. *Bullington*, 330 U. S. 183, failure of your petitioners to seek a review of this determination by a writ of certiorari from the United States Supreme Court to the State Supreme Court would apparently waive the right to raise the Federal question in any further proceedings.

Questions Presented

I

Where jurisdiction of the trial court is contested by a party in a direct appeal from said court's final order, does the action of the State Supreme Court in applying presumptions of validity to a finding of jurisdictional fact made by the trial court, where the evidence in the record is wholly counter to such a finding, offend the due process clause of the Fourteenth Amendment to the United States Constitution?

II

Where railroad lands are assessed $150,000.00 and $50,000, which amounts to $500.00 and $1,210.00 per

acre, respectively, for a drainage ditch, compared with adjoining farm land assessments ranging from $0.00 to $14.00 per acre, and all competent testimony was that railroad lands in the drainage district would receive no benefit whereas farm lands and an adjoining state highway would be materially benefited, are such railroad assessments so arbitrary, capricious and unreasonable as to deprive your petitioners of the equal protection of the law guaranteed by Section 1 of the Fourteenth Amendment to the United States Constitution?

Reasons Relied On for Allowance of Writ

1. The State Supreme Court has decided that attributing to an *ex parte* finding of jurisdiction over the subject matter (made by the trial court without jurisdiction *in personam* or *in rem*) the value of prima facie evidence of the existence of such jurisdiction by reliance on Section 106.71, Minnesota Statutes, 1945, Appendix A, hereto, where the record evidence shows lack of such jurisdiction, does not deprive your petitioners of their property without due process of law contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States. The decision of the State Supreme Court is not in accord with the applicable decisions of this Court; particularly *Galpin* v. *Page*, 85 U. S. 350, 368, 371 (18 Wall. 350, 368, 371), and *Harvey* v. *Tyler*, 69 U. S. 328, 341, 342 (2 Wall. 328, 341, 342), wherein this Court held that where lack of jurisdiction is affirmatively shown in the record presumptions will not be indulged in in favor of such jurisdiction, and *Western & Atlantic Railroad* v. *Henderson*, 279 U. S. 639, wherein this Court held that reliance on a statute creating a presumption as establishing basic facts denies due process of law contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States. This decision was called to the atten-

tion of the State Supreme Court in the petition for rehearing filed February 21, 1949, and denied March 4, 1949 (R. 800). This and other cases are discussed in the brief in support of this petition attached hereto.

2. The State Supreme Court has decided that reliance on a presumption as to the propriety and regularity of official action as a basis for sustaining the trial court's finding of jurisdictional fact, where such finding is contrary to the record, does not deprive your petitioners of their property without due process of law contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States. The decision of the State Supreme Court is not in accord with the applicable decisions of this Court, particularly *Oregon RR. & N. Co.* v. *Fairchild*, 224 U. S. 510, where this Court held that insufficiency of evidence to support a finding could not be supplied on the judicial review by a presumption arising from the failure of the petitioner to disprove what had not been established. The cases of *Western and Atlantic Railroad* v. *Henderson, supra, Galpin* v. *Page, supra,* and *Harvey* v. *Tyler, supra,* are also controlling. These decisions and other cases are discussed in the brief in support of this petition attached hereto.

3. The State Supreme Court has decided that the assessments made by the viewers against your petitioners were not so arbitrary, unreasonable, capricious, improper and illegal as to deprive your petitioners of the equal protection of the law guaranteed by Section 1 of the Fourteenth Amendment to the Constitution of the United States. The decision of the State Supreme Court is not in accord with applicable decisions of this Court, particularly *Kansas City Southern Ry. Co.* v. *Road Improvement District No. 6,* 256 U. S. 658, and *Thomas* v. *Kansas City Southern Railway Co.,* 261 U. S. 481, where this Court held that palpable and arbitrary discrimination against railroad companies in as-

sessing disproportionately excessive amounts against said companies for local improvements denied said railroad companies equal protection of the law contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States. These decisions were called to the attention of the State Supreme Court in your petitioners' brief on appeal to the State Supreme Court, Appendix B, hereto. These decisions and other cases are discussed in the brief in support of this petition attached hereto.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Court, directed to the Supreme Court of the State of Minnesota, commanding that Court to send to this Court for review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the consolidated cases numbered and entitled on its docket:

No. 34689—Certiorari

STATE OF MINNESOTA, ex rel., GREAT NORTHERN RAILWAY COMPANY, Relator,

vs.

DISTRICT COURT OF THE SIXTEENTH JUDICIAL DISTRICT OF MINNESOTA and HONORABLE E. R. SELNES, as Judge of said District Court, Respondent

---

No. 34690—Certiorari

STATE OF MINNESOTA, ex rel., MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILROAD COMPANY, Relator

vs.

DISTRICT COURT OF THE SIXTEENTH JUDICIAL DISTRICT OF MINNESOTA, and HONORABLE E. R. SELNES, as Judge of said District Court, Respondent

No. 34693—Appeal

IN RE JUDICIAL DITCH NO. 12, GRANT, TRAVERSE AND WILKIN COUNTIES

GREAT NORTHERN RAILWAY COMPANY, Appellant,

vs.

PAUL F. LEHMAN, et al., Respondents

No. 34694—Appeal

IN RE JUDICIAL DITCH NO. 12, GRANT, TRAVERSE AND WILKIN COUNTIES

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILROAD COMPANY, Appellant,

vs.

PAUL F. LEHMAN, et al., Respondents

and that said judgment of the Supreme Court of the State of Minnesota be reversed by this Court, and that your petitioners may have such other and further relief as to this Court may seem meet and just; and your petitioners will ever pray.

GREAT NORTHERN RAILWAY COMPANY,
By EDWIN C. MATTHIAS,
ANTHONY KANE,
ROBERT W. CRONON,
Counsel for Petitioner.

A. REA WILLIAMS,
Of Counsel.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILROAD COMPANY,
By JAMES L. HETLAND,
ROSS L. THORFINNSON,
Counsel for Petitioner.

MOTION

Petitioners, Great Northern Railway Company and Minneapolis, St. Paul & Sault Ste. Marie Railroad Company, respectfully show to this Court:

1. That the record certified to the United States Supreme Court by the Clerk of the Supreme Court of the State of Minnesota consists of two volumes of printed record (758 pages), together with Exhibits A, B, C, D, E, F, H, I, J, K and L and Soo Line Exhibits 1 and 2.

2. That ten copies of the printed record have been furnished to your Court for the purposes of the foregoing petition for a writ of certiorari.

3. That Exhibits A, B and C consist of 111 blueprint sheets, size 22″x36″; that Exhibits D and L consist of 46 blueprint sheets, size 22″x48″; that Exhibits E, F and K consist of 161 pages of figures indicating cubic yards of dirt to be removed for Judicial Ditch 12; that Exhibits H and J are the viewers' reports and consist of more than 50 pages of tabulation of assessments; that Soo Line Exhibits 1 and 2 are maps of the drainage area involved; and Exhibit I is a photograph of a particular section of the drainage area.

4. That if said exhibits were reproduced by photostatic process and reduced in size to conform to United States Supreme Court rules, the material contained thereon would appear hardly legible and that the expense of reproducing said exhibits would be excessive.

Your petitioners, Great Northern Railway Company and Minneapolis, St. Paul & Sault Ste. Marie Railroad Company, respectfully move this Court for an order that said exhibits need not be reproduced and extra copies furnished

and that the certified exhibits now in the hands of this Court may be referred to by both parties in their briefs and arguments.

Respectfully submitted,

GREAT NORTHERN RAILWAY COMPANY,
By EDWIN C. MATTHIAS,
ANTHONY KANE,
ROBERT W. CRONON.

A. REA WILLIAMS,
Of Counsel.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILROAD COMPANY,
By JAMES L. HETLAND,
ROSS L. THORFINNSON.

BRIEF IN SUPPORT OF PETITION

I

The Opinion of the Court Below

The opinion of the Supreme Court of the State of Minnesota dated January 28, 1949, and denial of petition for rehearing on March 4, 1949, are reported in *State ex rel. Great Northern Ry. Co. et al.* v. *District Court of Sixteenth Judicial District et al.; In re Judicial Ditch No. 12, Grant, Traverse and Wilkin Counties; Great Northern Ry. Co. et al.* v. *Lehman et al.*, 36 N. W. 2d 336.

II

Jurisdiction

The jurisdiction of this Court is invoked under *Title 28, United States Code*, §1257 (3) and 2101 (c).

Petition for rehearing filed with the State Supreme Court was denied on March 4, 1949, and judgment of that Court was entered on March 4, 1949.

III

Statement of the Case

A statement of the case has been given in the petition under the heading "Summary Statement of the Matter Involved."

IV

Specifications of Error

1. The Supreme Court of the State of Minnesota erred in entering judgment in favor of respondents and against your petitioners in this, that the application of presumptions of validity to a finding of jurisdictional fact contrary to the evidence in the record deprives your petitioners of

their property without due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

2. The Supreme Court of the State of Minnesota erred in entering judgment in favor of respondents and against your petitioners in this, that the assessments against your petitioners contained in the viewers' report, as approved by the judgment entered in this proceeding, are so arbitrary, capricious, unreasonable and discriminatory as to deprive your petitioners of the equal protection of the law guaranteed by Section 1 of the Fourteenth Amendment to the Constitution of the United States.

V

ARGUMENT

A. With Respect to Lack of Due Process

This Court has uniformly held that where the trial court acts without jurisdiction over the subject matter, such action offends the due process clause of Section 1 of the Fourteenth Amendment to the United States Constitution. In *Thompson* v. *Whitman*, 85 U. S. 457, this Court, at page 461, reiterated Chief Justice Marshall's holding in *Rose* v. *Himley*, 8 U. S. 240, 268 (4 Cranch 241, 269), that:

> "Upon principle, it would seem that the operation of every judgment must depend on the power of the court to render that judgment; or, in other words, on its jurisdiction over the subject-matter which it has determined."

Pennoyer v. *Neff*, 95 U. S. 714, 733, established the proposition that the judgment of a state court may be questioned on the grounds of want of jurisdiction under the Fourteenth Amendment to the Federal Constitution since the due process clause includes the concept that every court shall have jurisdiction to pass upon the subject matter of the suit.

In *Scott* v. *McNeal,* 154 U. S. 34, 46, this Court said:

> "No judgment of a court is due process of law, if rendered without jurisdiction in the court, or without notice to the party."

In *Powell* v. *Alabama,* 287, U. S. 45, 68, this Court said:

> "It never has been doubted by this court, or any other so far as we know, that notice and hearing are preliminary steps essential to the passing of an enforceable judgment, and that they, together with a legally competent tribunal having jurisdiction of the case, constitute basic elements of the constitutional requirement of due process of law."

A judicial ditch in the State of Minnesota can be created only by order of the District Court (trial court) acting in strict compliance with the requirements of the Drainage Code. The proceedings are special statutory proceedings.

The Minnesota Supreme Court in *State ex rel. Town of Dovray* v. *Nelson* (1920), 145 Minn. 31, 176 N. W. 181, held that:

> "Drainage proceedings in this State are purely statutory and their validity depends upon a strict compliance with the provisions of the statute by which they are regulated and controlled. Curran v. County of Sibley, 47 Minn. 313, 50 N. W. 237; Lager v. County of Sibley, 100 Minn. 85, 110 N. W. 355. The petition by which such proceedings are instituted is a jurisdictional prerequisite of the authority of the court to take action. * * * State v. Watts, 116 Minn. 326, 133 N. W. 971."

The procedure for establishment of a judicial ditch by the filing in the District Court of a petition signed by the requisite number of resident landowners is set out in Section 106.03, Minnesota Statutes, 1945, Appendix A, hereto. The State Supreme Court has held that strict compliance with

the Drainage Code's requirements with respect to the ditch petition is a jurisdictional prerequisite to the trial court's authority to establish a judicial ditch. *State ex rel. Town of Dovray* v. *Nelson, supra.*

Lack of jurisdiction of the trial court over the subject matter can be raised at any stage of the appellate proceeding. *C., M., St. P. & P. Ry. Co.* v. *Sprague* (1918), 140 Minn. 1, 167 N. W. 124; *Skolnick* v. *Gruesner* (1936), 196 Minn. 318, 265 N. W. 44; *Kennedy* v. *Bank of Georgia,* 49 U. S. 586 (8 How. 586); *Pittsburgh C. & St. L. R. Co.* v. *Ramsey,* 89 U. S. 322 (22 Wall. 322); *United States et al.* v. *Griffin et al.,* 303 U. S. 226.

Judicial Ditch No. 12 proceedings were instituted by the filing of an unverified petition signed by a number of persons alleged to be resident owners of lands over and through which the proposed ditch would pass (R. 1-13). The trial court in its order establishing the ditch made a specific finding "that the original ditch petition filed herein is in all respects and particulars ample and sufficient in law and complies with the statutes applicable thereto, and that the same is signed by a sufficient number of resident owners of lands over which the proposed ditch will pass" (R. 86). The trial court made this finding to support its order establishing the ditch although the only evidence in the record as to the sufficiency of signers on the petition (the viewers' report, Exhibit H) affirmatively established that the petition was not signed by sufficient resident land owners to give the court jurisdiction over the subject matter.

In *Lamp Chimney Co.* v. *Brass & Copper Co.,* 91 U. S. 656, 661, 662, this Court said: "If there be a total defect of evidence to prove the essential fact, and the court find it without proof, the action of the court is void."

The parties stipulated for a settled case (R. 115, 116) which was certified by the trial judge of the District Court and his court reporter as *containing all of the evidence*

before the court in the determination of the case (R. 117). The exhibits and the settled case, Volumes I and II of the record, were before the State Supreme Court and have been certified to this Court. This record was devoid of any evidence which would sustain the trial court's finding of jurisdiction over the subject matter. Actually the record before the Court contained positive evidence that the trial court lacked jurisdiction over the subject matter. In *Merchants & F. Mut. Cas. Co.* v. *St. Paul Mercury Ind. Co.* (1944), 218 Minn. 386, 393, 16 N. W. 2d 463, 466, the Minnesota Supreme Court said:

> "In any event, we are bound by the settled case as here submitted, particularly in view of the fact that it has the corroboration not only of the trial court but of the court reporter in the proceedings."

In sustaining the trial court's finding on the essential question as to the existence of the jurisdictional fact necessary for authority of the trial court to establish the ditch, the State Supreme Court, unable to find supporting evidence in the record, applied presumptions to give validity to this finding (R. 770, 771). These presumptions were applied although there was positive evidence to the contrary.

The question for determination is, can the State Supreme Court apply presumptions in lieu of evidence and contrary to the record to sustain this essential finding without violating the due process clause of the Fourteenth Amendment to the United States Constitution.

The presumptions applied by the State Supreme Court were twofold:

1. It pointed out that the trial court had made a finding in its *ex parte* order appointing the ditch engineer that the petition was signed by a sufficient number of landowners to comply with the statutory requirements (R. 769). Section 106.05, Minnesota Statutes, 1945, Appendix A, hereto,

provides that upon the filing with the trial court of a petition seeking establishment of a judicial ditch, the trial court shall appoint a civil engineer to consider the proposed drainage ditch as described in the petition therefor and make a preliminary report to the court concerning the feasibility of the drainage project. This *ex parte* finding of sufficient signers was made by the trial court on the same day the ditch petition was filed. At that stage of the proceedings, the trial court had not acquired jurisdiction either *in rem* of the lands or *in personam* of the owners of lands within the drainage area. Your petitioners had no notice of this hearing nor any opportunity to be heard by the Court before the finding was made.

Section 106.07, Subdivision 1, Minnesota Statutes, 1945, Appendix A, hereto, provides for publication of notice of the time and place of preliminary hearing on petition for the ditch, posting of said notice and service of same by mail on affected landowners, compliance with which is essential for the trial court to acquire jurisdiction *in rem* and *in personam*. There was no publication, posting or service of any notice until several months after the *ex parte* finding of the judge in his order appointing the ditch engineer (R. 29-47).

Since this was a special statutory proceeding, it was essential that the trial court's authority be specifically contained in the drainage law. The Drainage Code contained no authority for the trial court's *ex parte* finding as to the sufficiency of the petition. Section 106.26, Subdivision 1, Minnesota Statutes, 1945, Appendix A, hereto, required the trial court to examine the ditch petition at the hearing on the engineer's report and viewers' report subsequent to acquiring jurisdiction *in rem* and *in personam*.

The *ex parte* finding and order of the trial court were *void* because made prior to the trial court's acquisition of jurisdiction *in personam* and *in rem*.

In *Scott* v. *McNeal*, 154 U. S. 34, 46, this Court held:

> "No judgment of a court is due process of law, if rendered without jurisdiction in the court, or without notice to the party."

In *Galpin* v. *Page*, 85 U. S. 350, 368 (18 Wall. 350, 368), this Court held:

> "It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his day in court, by which is meant, until he has been duly cited to appear, and has been afforded an opportunity to be heard. Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and never can be upheld where justice is justly administered."

See also *Harvey* v. *Tyler*, 69 U. S. 328, 346 (2 Wall. 328, 345); *Powell* v. *Alabama*, 287 U. S. 45, 68; and *Pennoyer* v. *Neff*, 95 U. S. 714. The State Supreme Court applied to this *ex parte* finding a presumption of validity based on the provisions of Section 106.71, Minnesota Statutes, 1945, Appendix A, hereto. Such action deprives your petitioners of due process of law guaranteed by Section 1 of the Fourteenth Amendment to the United States Constitution.

In *Western & Atlantic Railroad* v. *Henderson*, 279 U. S. 639, 642, this Court said:

> "A statute creating a presumption that is arbitrary or that operates to deny a fair opportunity to repel it violates the due process clause of the Fourteenth Amendment. Legislative fiat may not take the place of fact in the judicial determination of issues involving life, liberty or property."

See also *Manley* v. *Georgia*, 279 U. S. 1, 6; *Bailey* v. *Alabama*, 219 U. S. 219, 233; *McFarland* v. *American Sugar Co.*, 241 U. S. 79, 86.

2. The State Supreme Court proceeded to apply a further presumption which it designated as the "usual presumption of regularity and propriety of official action" and found that the final order in a ditch proceeding is presumptive evidence of the validity of each step taken (R. 770).

Your petitioners contend that reliance on this presumption to sustain a finding of jurisdictional fact essential to jurisdiction over the subject matter of the action, where the evidence before the court affirmatively established that such jurisdictional fact did not exist, violates your petitioners' rights under the due process clause of Section 1 of the Fourteenth Amendment to the United States Constitution. Existence of jurisdiction in the trial court is essential to authority of the trial court to establish a judicial ditch. Jurisdiction over the subject matter cannot and should not be presumed where the evidence in the record conclusively shows that the petition has not been signed by the requisite number of landowners to give the trial court such jurisdiction. *Oregon R. R. & N. Co.* v. *Fairchild,* 224 U. S. 510. *A fortiori* the action of the trial court was void, *Lamp Chimney Co.* v. *Brass & Copper Co., supra.*

If it is not necessary that the trial court's jurisdiction of the subject matter in a judicial ditch proceeding be established by the introduction of sufficient evidence in the record being taken before it, then the function of the trial judge is no longer that of a trier of facts but simply an issuer of orders. The Judge will know that in a judicial ditch proceeding upon appeal to the State Supreme Court his order will be upheld by reliance upon presumptions regardless of affirmative evidence in the record to the contrary.

Those presumptions become in effect conclusive presumptions which render the trial judge's order immune from all attack. It should be kept in mind that in the instant case the evidence in the record would only sustain a finding as to lack of jurisdiction over the subject matter. To apply the pre-

sumption and disregard the record is to make the presumption conclusive.

When the State Supreme Court sustained the trial court's finding on this essential jurisdictional fact by reliance on the presumption created by Section 106.71 and by reliance on the presumption as to the regularity and propriety of official action it violated that fundamental principle of Anglo-Saxon jurisprudence that *allegata* and *probata* must correspond. *Southern Railway* v. *King*, 217 U. S. 524, 536; *United States* v. *Commissioner of Immigration*, 273 U. S. 103, 106. The allegation in the unverified ditch petition as to signers was never proved.

Oregon R. R. & N. Co. v. *Fairchild*, 224 U. S. 510, 533, was an appeal by the railroad from an order of the Washington Railroad Commission ordering it to establish certain track connections. The Commission was empowered to act only when the evidence established that the public necessity required the track connection. This Court said:

> "The insufficiency of the evidence submitted to the Commission could not under this statute be supplied on the judicial review by a presumption arising from the failure of the carrier to disprove what had not been established."

In said case your Court refused to permit the Oregon State Court to rely on presumptions to support insufficient record evidence of an essential jurisdictional fact on the grounds that such action would deprive that petitioner of property without due process of law under Section 1 of the Fourteenth Amendment to the United States Constitution. Certainly, the action of the Minnesota Supreme Court in applying presumptions to sustain a finding of jurisdiction contrary to affirmative record evidence deprives your petitioners of their property without due process of law. Your petitioners consider the decision in the *Oregon* case to be

controlling. The State Supreme Court's decision is not in accord with the decisions of this Court as exemplified by the case of *Oregon R. R. & N. Co.* v. *Fairchild, supra.* See also *Chicago, M., St. P. & P. R. R. Co.* v. *Minnesota,* 134 U. S. 418.

The essential elements of due process of law, jurisdiction over the subject matter in the case of the findings and order of the trial court on the final hearing and jurisdiction *in personam* and *in rem,* as well as jurisdiction over the subject matter in the case of the trial court's finding in the *ex parte* order, are not present in this case. The state court's order establishing the drainage ditch violates the rights of your petitioners under the due process clause of Section 1 of the Fourteenth Amendment to the Constitution of the United States. This violation of Federal rights involves a substantial Federal question that should be reviewed by this Court.

B. With Respect to Denial of Equal Protection of Law

Petitioner railroad companies were not treated like individual landowners by the viewers in the trial court proceedings insofar as assessments against their property within the drainage district are concerned. The discrimination resulting from an assessment against petitioner Great Northern Railway Company's property of $500.00 per acre, for a total of $150,000.00 and against petitioner Minneapolis, St. Paul & Sault Ste. Marie Railroad Company's property of $1,210.00 per acre, for a total of $50,000.00, compared to assessments against adjoining farm lands within the assessment area ranging from $0.00 to a maximum of $14.00 per acre, is so palpable and arbitrary as to amount to a denial of the equal protection of the law guaranteed by Section 1 of the Fourteenth Amendment to the United States Constitution. The total acres in the drainage area are 74,000 (R. 25). The total assessed benefits for lands in the

drainage area are $1,145,000.00 (R. 208). The total acres owned by petitioner, Great Northern Railway Company, in the drainage area are 299.27 (R. 460). The total acres owned by petitioner, Minneapolis, St. Paul & Sault Ste. Marie Railroad Company, in the drainage area are 39.55 (Exhibits 1 and 2).

A mathematical calculation from these figures shows that petitioner, Great Northern Railway Company, owns .4 of 1% of the total acres in the assessment area and is being assessed 13.1% of the total assessments against all property within the drainage area; a like calculation shows that petitioner, Minneapolis, St. Paul & Sault Ste. Marie Railroad Company, owns .05 of 1% of the total acres in the assessment area and is being assessed 4.37% of the total assessments against all property within the drainage area.

As pointed out in the *Summary Statement of the Matter Involved* in the petition, there will be no benefits derived by your petitioners from the construction of Judicial Ditch No. 12. By contrast, farm lands within the drainage area and State Highway No. 9 will be greatly benefited by construction of said ditch.

The United States Supreme Court has held that benefits from local improvements must be estimated upon contiguous property according to some standard which will produce approximately correct general results on the assessments. *Kansas City Southern Ry. Co.* v. *Road Improvement District No. 6*, 256 U. S. 658. The evidence as to benefits to the petitioners from construction of the drainage ditch clearly did not warrant such unreasonably large assessments against your petitioners' lands as compared to the relatively small assessments against agricultural lands which would be principally benefited by the proposed project.

The State Supreme Court held that the viewers did not adopt an illegal and improper method in assessing benefits and awarding damages (R. 761, 764). In so deciding, the

State Supreme Court determined adversely your petitioners' claim (Appendix B, hereto) that the method adopted by the viewers in assessing railroad properties was so discriminatory as to amount to a denial of equal protection of the law guaranteed by Section 1 of the Fourteenth Amendment to the United States Constitution. Said claim was presented to the State Supreme Court in accordance with its Rules of Practice and was decided by it. *Sully* v. *American National Bank*, 178 U. S. 289, 298; *Nickey* v. *Mississippi*, 292 U. S. 393.

If the viewers' method of assessing railroad properties is a legal and proper method, railroad properties in the State of Minnesota will be burdened with a disproportionate share of the cost of constructing drainage ditches designed primarily for the drainage of farm lands and construction or reconstruction of state and local highways.

In *Kansas City Southern Ry. Co.* v. *Road Improvement District No. 6, supra*, this Court condemned a formula adopted by viewers which divided farm land into five zones, determined by distance from the proposed improvement, and assessed uniform benefits upon all within the same zone without regard to improvements or market value, in the first, $12.00 per acre; second, $10.00; third, $8.00; fourth, $6.00; and fifth, $4.00. A railroad located within the improvement area was assessed $67,900.00 as benefits to be derived from construction of 11.2 miles of graveled road. The statute there under consideration, like the Minnesota statute involved herein (Section 106.17, Minnesota Statutes, 1945, Appendix A, hereto), prescribed no definite standard for determining benefits from proposed improvements. This Court stated at page 661:

> "Obviously, the railroad companies have not been treated like individual owners, and we think the discrimination so palpable and arbitrary as to amount to a denial of the equal protection of the law. Benefits

from local improvements must be estimated upon contiguous property according to some standard which will probably produce approximately correct general results. To say that 9.7 miles of railroad in a purely farming section, treated as an aliquot part of the whole system, will receive benefits amounting to $67,900.00 from the construction of 11.2 miles of gravel road seems wholly improbable, if not impossible. Classification, of course, is permissible, but we can find no adequate reason for what has been attempted in the present case. *Royster Guano Co. v. Virginia*, 253 U. S. 413, 415. It is doubtful whether any very substantial appreciation in value of the railroad property within the district will result from the improvement; and very clearly it cannot be taxed upon same fanciful view of future earnings and distributed values, while all other property is assessed solely according to area and position. Railroad property may not be burdened for local improvements upon a basis so wholly different from that used for ascertaining the contribution demanded of individual owners as necessarily to produce manifest inequality. Equal protection of the law must be extended to all."

It is submitted that the *Kansas City Southern* case, *supra*, requires a holding that the action of the viewers in the case at bar was so arbitrary, capricious and unreasonable as to deprive your petitioners of equal protection of law guaranteed by Section 1 of the Fourteenth Amendment to the United States Constitution. As this Court granted a petition for certiorari in that case, we believe the facts herein show that the same course should be pursued in this case.

In *Thomas* v. *Kansas City Southern*, 261 U. S. 481, Mr. Justice Brandeis said:

"The tax laid imposes upon the railroad, which can receive no direct or immediate benefit, a very heavy burden; and the lands which will receive a large direct (and possibly immediate) benefit, are required to bear only a very small part of the burden. * * * The fact is that the tax levied is grossly discriminatory. * * *"

Based on the decisions of this Court in *Kansas City Southern Railway Co.* v. *Road Improvement District No. 6, supra,* and *Thomas* v. *Kansas City Southern, supra,* your petitioners submit that the State Supreme Court's affirmation of the action of the viewers in arriving at arbitrary and unreasonably disproportionate assessments for benefits against your petitioners involves a substantial Federal question, which should be reviewed by this Court.

Conclusion

It is, therefore, respectfully submitted that the Petition for Writ of Certiorari should be granted, and that the cause should be reviewed in this Court, and the judgment and proceedings of the Supreme Court of the State of Minnesota should be reversed.

Respectfully submitted,

EDWIN C. MATTHIAS,
ANTHONY KANE,
ROBERT W. CRONON,
Counsel for Petitioner,
Great Northern Railway Company.

A. REA WILLIAMS,
Of Counsel.

JAMES L. HETLAND,
ROSS L. THORFINNSON,
Counsel for Petitioner,
Minneapolis, St. Paul & Sault Ste. Marie Railroad Company.

APPENDIX A

Minnesota Statutes, 1945

Sec. 106.03 Petitions; signatures, filing; bond

Before any public drainage system, drain, or other improvement authorized by this chapter shall be established, a petition signed by not less than a majority of the resident owners of the land described in the petition or by the owners of not less than 51 per cent of the area of such land, setting forth the necessity thereof that the same will be of public utility and will promote the public health, the description of the starting point, the general course and terminus of the same, together with a description of the lands over which the proposed ditch or improvement passes, and that the petitioners will pay all costs and expenses which may be incurred in case the proceedings are dismissed, or for any reason no contract for the construction thereof is let, shall be filed, if for a county drainage system, with the county auditor, if for a judicial drainage system, with the clerk of the district court. Such petition may also be signed by the supervisors of any town or the proper officers of any city or village authorized by resolution of the council thereof, which town, village, or city is liable to be affected by or assessed for the proposed construction, or by the duly authorized agent of any public institution, corporation, or railroad whose lands or property may be affected by or assessed for the expense of the construction, or by the director of public institutions or his duly authorized agent, but in such case the signature of such supervisors, village officers, authorized agents of any public institutions, or other corporations, or any or either of them, shall each count only as one signature on a petition.

Upon the filing of a petition and before any action is taken thereon, one or more of the petitioners shall make and file a bond payable, in case of a county drainage system, to the county, and in case of a judicial drainage system, to the counties named in the petition, in the sum of not less than $2,000, with good and sufficient sureties, to be approved by the officer with whom the same is filed, conditioned to

pay all costs and expenses which may be incurred in case the proceedings are dismissed or for any reason no contract is entered into for the construction of the improvement petitioned for. If it be made to appear, at any time prior to the making of the order directing the construction of such improvement, that the bond of the petitioners is insufficient, either in amount or as to sureties, to protect the county or counties from loss on account of any costs or expenses incurred or to be incurred, the court or board may, and it shall, require a further and additional bond, and all further proceedings shall be stayed until such bond is furnished, and if such additional bond is not furnished within such time as the board or court shall designate, the proceedings may be dismissed.

Sec. 106.05 Engineer; appointment, oath, bond

Upon the filing of the petition and bond, the county board, in a county drainage proceeding, or the judge of the district court, in a judicial drainage proceeding, shall, within 30 days thereafter, by order appoint a competent and experienced civil engineer and direct him to proceed and examine into and report, within the time fixed in the order, to the board or court all matters necessary and essential to disclose the practicability, necessity, and advisability of the construction of the proposed improvement. The engineer so appointed shall within ten days thereafter take and subscribe an oath to faithfully perform the duties assigned to him according to the best of his ability, and give a bond in the sum of not less than $5,000 with good and sufficient surety, payable to the county or counties affected by the proposed improvement, for the benefit of the county or counties, and for the use of all parties aggrieved or injured by any negligence or malfeasance on the part of the engineer so long as he is in any manner employed in the proceedings, conditioned that he will diligently, honestly, and to the best of his skill and ability, during the full period of his employment, perform his duties as such engineer in the proceeding, this bond to be approved by the auditor or clerk, as the case may be. In case of a change of engineers, each new engineer shall make and file the oath and bond provided for herein. Provided,

however, that where the engineer so appointed is an employee of the United States Department of Agriculture as a soil conservation engineer, the bond herein provided for may be waived by the appointing authority. As amended Laws 1945, c. 97, Sec. 1.

Sec. 106.07 Preliminary hearing

Subdivision 1. Time; notice. Upon the filing of the report of the engineer as provided in section 106.06 with the county auditor or the clerk of the district court, as the case may be, it shall be the duty of the auditor to immediately notify the county board, or the clerk, the judge of the district court, of the filing of the report, and the auditor or the clerk, with the approval of the judge, shall fix a time for the hearing thereon, not to exceed 30 days from the date of the filing thereof and within ten days thereafter shall by mail notify the several petitioners and the owners of the several tracts of land and corporations, public or private, affected by the proposed improvement, as shown in the engineer's report, of the time and place of the hearing; and at such time and place the engineer shall attend before the county board or district court and make such explanation and supply such information as may be necessary to fully inform the board or court of all facts named or referred to in his report and such other facts as affect or relate to such improvement petitioned for or as recommended by him.

Sec. 106.17 Duties of viewers

Subdivision 1. Oath, tabular statement. The viewers, after taking the oath to faithfully perform their duties, shall proceed at the time set in the order, with or without the civil engineer, and prepare in duplicate a tabular statement showing as far as practicable the description of each tract of land benefited or damaged; with the names of the owners as the same appear on the last county tax duplicate of the county, the total number of acres in each tract of land benefited or damaged, as the case may be, the number of acres added to any tract by the total or partial drainage of any meandered lake, or by the change of any watercourse, and the location and value of such added land; the damage, if

any, to riparian rights pertaining to any tract; and the amount that each tract of land will be benefited or damaged by the construction of the work; when any drainage system established under this chapter drains in whole or in part any public or corporate road or railroad, or benefits any such road or railroad so that the roadbed or traveled track of any such road or railroad will be made better by the construction of such system, the viewers shall estimate the benefits arising therefrom to such road, roadbed, or railroad and report such benefits, giving the names of such roads or railroads, and other particulars necessary to identify the corporations, private or public, that will be benefited thereby and the amount of benefits to each, as a part of their tabular statement provided for in this section.

Subdivision 2. Report of benefits and damages. The viewers shall report as a part of such tabular statement the benefits that will result to villages or cities by way of increased drainage facilities or improvements to public health and also the damages awarded to each municipal or other corporation, and to each person, or association of persons, telephone or telegraph line or other personal property, and from the necessary construction and maintenance of any bridges, culverts, or other works rendered necessary by the establishment of such drainage improvement, stating the same separately; and they shall report the total estimated benefits in respect to the entire system and branches, if any, and whether or not the estimated expense of the construction of such improvement, including the damages awarded therefor, is greater than the utility of the proposed drainage system or that the construction of such a system is impracticable for any reason, stating the reason why it should not be constructed.

In case the viewers are unable to agree, each viewer shall state separately in his report his findings on the matter disagreed upon.

A majority of the viewers shall be competent to perform the duties required of them by this chapter.

Sec. 106.24 Final hearing

Subdivision 4. Mailing printed copies of notice. Within one week after the beginning of such publication the county auditor, in the case of county drainage proceedings, or the clerk of the district court, in the case of judicial proceedings, shall mail a printed copy of the notice to the state auditor, the commissioner, and to all persons and corporations who are the owners of land or who are otherwise affected by the proposed drainage system as shown by the engineer's and viewers' reports whose addresses are known to the county auditor, in the case of county drainage proceedings, or the clerk of the district court, in a judicial proceeding, or can be ascertained, respectively, by the auditor or clerk by inquiry at the county treasurer's office of the county wherein such lands, roads, railroads, or municipal corporations are situated.

In all judicial proceedings extending into two or more counties it shall be the duty of the clerk to mail to all persons and corporations who are the owners of lands, roads, or railroads, or otherwise affected by the proceedings not less than ten days before the date of hearing copies of the notice printed in their respective counties.

Sec. 106.26 Proceedings at hearings

Subdivision 1. Consideration of petition. At the time and place specified in the notice or at any adjournment thereof, the county board, in case of a county drainage proceeding, or the judge of the district court, in case of a judicial proceeding, shall proceed to consider the petition for such drainage system, together with all matters pertaining to the engineer's and viewers' reports therein, and consider the testimony presented in behalf of all parties interested. At such final hearing the engineer or his deputy assistant and at least two viewers shall be present. Such hearing may be continued or adjourned from time to time as shall be found necessary by the board or court.

Sec. 106.71 Records prima facie evidence

The record of any proceeding conducted under the provisions of this chapter and any order made by the county

board or the district court in such proceeding, the record thereof and the certified copy of the record or of any order of the board or the court made in proceedings conducted under this chapter, shall be prima facie evidence of the facts therein stated and of the regularity of all the proceedings prior to the making of such order.

APPENDIX B

Extracts From "Appellants-Relators' Brief" Before Minnesota Supreme Court (pages 65, 66, 72, 73, 78, 79)

"IV

The Viewers' Reports Were Not Made in Accordance With Law, and the Assessments of Benefits and Allowance of Damages Violates Constitutional Rights.

(Assignments of Error Nos. III, V, VII, VIII and IX.)

* * *

In *Kansas City Southern Ry. Co.* v. *Road Improvement District No. 6* (1921), 256 U. S. 658, * * * the United States Supreme Court reversed the Arkansas State Court which had approved the assessment.

* * *

In *Kansas City Southern Ry. Co.* v. *Road Improvement District No. 6, supra,* the United States Supreme Court, after criticizing the method used by the assessment board in making assessments against farm lands by use of an arbitrary formula, said at page 661:

> 'Obviously, the railroad companies have not been treated like individual owners, and we think the discrimination so palpable and arbitrary as to amount to a denial of the equal protection of the law. Benefits from local improvements must be estimated upon contiguous property according to some standard which will probably produce approximately correct general

results. To say that 9.7 miles of railroad in a purely farming section, treated as an aliquot part of the whole system will receive benefits amounting to $67,900.00 from the construction of 11.2 miles of gravel road seems wholly improbable, if not impossible. Classification, of course, is permissible, but we can find no adequate reason for what has been attempted in the present case. *Royster Guano Co.* v. *Virginia*, 253 U. S. 413, 415. It is doubtful whether any very substantial appreciation in value of the railroad property within the district will result from the improvement; and very clearly it cannot be taxed upon some fanciful view of future earnings and distributed values, while all other property is assessed solely according to area and position. Railroad property may not be burdened for local improvements upon a basis so wholly different from that used for ascertaining the contribution demanded of individual owners as necessarily to produce manifest inequality. Equal protection of the law must be extended to all.'

In *Thomas* v. *Kansas City Southern Ry. Co.* (1923), 261 U. S. 481, 43 S. Ct. 440, 67 L. Ed. 758, the railroad tracks were above flood level and would derive no direct benefit from the drainage improvement. Other lands in the drainage district were marshy and subject to overflow and the improvement would greatly increase their value. An assessment which would require the railroad, which owned only a small part of the land in the district, to pay the greater part of the cost of the improvement was held void because it showed such discrimination as to deprive the railroad of equal protection of the laws. Mr. Justice Brandeis said:

'The tax laid imposes upon the railroad, which can receive no direct or immediate benefit, a very heavy burden; and the lands which will receive a large direct (and possibly immediate) benefit, are required to bear only a very small part of the burden. * * * The fact

is that the tax levied is grossly discriminatory. * * *" (261 U. S. 485.)

* * *

It may be argued that the question of whether or not the viewers correctly assessed benefits and awarded damages is a matter to be determined upon appeal to District Court juries as provided in the statute. However, the question involved here is whether or not the Court erred in finding that the viewers' reports were made in accordance with law, that damages and benefits were duly determined and that the reports are complete, just and correct. In view of the above cases, it must be obvious that the action of the viewers was arbitrary, capricious and unwarranted, not only in connection with the assessments made against Appellants-Relators, but also in connection with assessments made against farm lands. Appellants-Relators contend that the assessments upon their properties were unequal, arbitrary, unreasonable, and in violation of the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution and Article I, Section 7, of the Minnesota Constitution. This finding of the lower court must be justified by the evidence contained in the record of this case. It is submitted that the evidence does not justify such a finding. Where the finding is so palpably wrong, it should not be allowed to stand."